

91-268

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NO.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1991

RAYMOND C. MANCHESTER

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent.

PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RAYMOND C. MANCHESTER
Pro Se
No. 86-A-2011
Box 51
Comstock, NY 12821



QUESTIONS PRESENTED

1. Is an indictment that has been consolidated from two separate indictments by the prosecutor with no docket number(s) and no signatures of either the district attorney or the grand jury foreperson an amended indictment or a mere technical violation that does not raise constitutional error?
2. Did the District and Appellate Court have the authority to dismiss the complaint and appeal pursuant to the provision of 28 U.S.C. § 1915(a)?

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U.S. v Robinson 904 F.2d 365, 369 (6th Cir.1990)	5
U.S. v Sullivan 919 F.2d 1403, 1436 (10th Cir.1990) . .	5
U.S. v Weiss 752 F.2d 777, 787 (2nd Cir. 1985).	5

OTHER AUTHORITIES:

Fifth Amendment, United States Constitution	1, 5
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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals issued May 16, 1991 is attached as Appendix A to this Petition. The District Court summarily denied the writ Feb. 4, 1991. That Order is attached as Appendix B. The District Court summarily denied the Petitioner a certificate of probable cause pursuant to 28 U.S.C § 1915(a) on March 25, 1991. That order is attached as Exhibit C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1991. An order denying Petitioner's Petition for Rehearing In Banc was entered on June 28, 1991 and is reprinted as Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution guarantees that: "No person shall be held to answer for a Capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury."

28 U.S.C. 1915(a) states:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitle to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

STATEMENT OF THE CASE

The Petitioner was indicted for murder in the second degree for the murder of James Henneney that took place on Feb. 23, 1984, indictment no. 1498-84. The indictment was filed March 13, 1984.

On November 11, 1984 the Petitioner was indicted for conspiracy in the second degree, criminal solicitation in the second degree, and criminal solicitation in the fourth degree. That indictment no. was 7627-84.

Those indictments were consolidated by the court on January 17, 1986. At no time was the "consolidated" indictment ever resubmitted to the grand jury, given a docket number, nor signed by either the District Attorney or the Grand Jury foreperson. The "consolidated" (or amended) indictment will be furnished if necessary. The Motion submitted by Petitioner is reprinted as Appendix E.

At no time did any of the lower courts involved bother to draw a distinction between consolidating and amending an indictment.

REASONS FOR GRANTING THE WRIT

1. The District Court had no authority to refuse to issue a certificate of probable cause that was not requested in the first place. 28 U.S.C. § 1915(a) refers only to appeals taken in forma pauperis. Petitioner had a U.S. postal money order in the

amount of \$105, no. 43503916138, sent to the Second Circuit Court of Appeals via certified mail no. P947032897 for his docketing fee, Southern District of New York Receipt No. 30212.

2. The Second Circuit's misrepresentation of his appeal on the issues as an appeal for a certificate of probable cause (Appendix A) was simply beyond the authority of that court.

3. At some point some court needs to squarely answer the question: Was Petitioner's indictment amended? Or wasn't it?

SUPREME COURT PRECEDENT

The sole function of the court is to enforce the law according to statute. Caminetti v. U.S. 37 S.Ct. 192, 194 (1917). Neither the District Court nor the Second Circuit Court of Appeals had the authority to judicially redraft statutory language in order to avoid adjudicating constitutional claims. U.S. v Locke 105 S.Ct. 1785, 1793 (1985). That is, this Court could easily remand this case back to the Second Circuit for adjudication pursuant to the misuse of 28 U.S.C. § 1915(a) and avoid the amended indictment issue entirely.

Failing that, this Court should address whether a District Attorney putting two indictments into one is a "consolidation" or an "amendment."

If it is an amendment, the law is quite clear. An amendment of an indictment by either prosecuting

indictment by grand jury guarantee of the Fifth Amendment. Ex parte Bain 7 S.Ct. 781 (1887), U.S. v Miller 105 S.Ct. 1811 (1985).

CONFLICT WITH OTHER CIRCUITS

The ruling of the Second Circuit Court of Appeals appears to conflict with all other Circuits. Including its own.

First, there must be consistent interpretation of statutes to give the fullest effect to Congressional intent. In re Ionosphere Clubs Inc. 922 F.2d 984, 991 (2nd Cir. 1990). As the statutory language of 28 U.S.C. § 1915(a) plainly spells out, a certificate of probable cause simply does not apply to a "paid-for" appeal.

Second, there is an amendment of the indictment when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. U.S. v Mollica 849 F.2d 723, 728 (2nd Cir. 1988), U.S. v Weiss 752 F.2d 777, 787 (2nd Cir. 1985).

The holdings in other circuits are basically the same. See e.g. U.S. v Robinson 904 F.2d 365, 369 (6th Cir.1990), U.S. v Field 875 F.2d 130 (7th Cir. 1989), U.S. v Sullivan 919 F.2d 1403, 1436 (10th Cir.1990), U.S. v Alvarez-Moreno 874 F.2d 1402, 1410 (11th Cir. 1989).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RAYMOND C. MANCHESTER

CERTIFICATE OF SERVICE

This is to certify that I have on this ____ day of August, 1991 placed a true and exact copy of the foregoing Writ of Certiorari, Raymond C. Manchester v. People of the State of New York, postage prepaid, addressed to:

Second Circuit Court of Appeals
Foley Square
New York, NY 10007

U.S. District Court
Southern District of New York
Foley Square
New York, NY 10007

District Attorney
1 Hogan Place
New York, NY 10013

Attorney General's Office
State of New York
120 Broadway
New York, NY 10271

Michael H. Brown
P.O. Box 25
Pleasant Hope, MO 65725



Appendix A



APPENDIX A

**UNITED STATES COURT OF APPEALS
Second Circuit**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the sixteenth day of May one thousand nine hundred and ninety-one.

RAYMOND C. MANCHESTER
Plaintiff-Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK
Defendants-Appellees

No. 91-2167

A motion having been made herein by the appellant pro se. Motions for a certificate of probable cause.

Upon consideration thereof, it is ordered that said motion be and it hereby is denied and appeal is dismissed.



Appendix B

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

RAYMOND C. MANCHESTER

Petitioner,

-v-

THE PEOPLE OF THE STATE OF NEW YORK

Respondent.

**91 CIV. 0732 (JSM)
ORDER**

JOHN S. MARTIN, DISTRICT JUDGE:

This court, having given careful consideration to the petition herein, and having concluded that petitioner has obtained adjudication of these claims in prior petitions to the Supreme Court, New York County entered on April 30, 1990 and to the Appellate Division, First Judicial Department, dated July 10, 1990 the claims herein are plainly and wholly frivolous and the petition fails to adequately state a claim upon which relief might be granted; accordingly, it is

ORDERED, that pursuant to Rule 4, 28 U.S.C.A. foll. § 2254, the Writ is summarily denied and the Clerk of the Court is directed to enter judgment dismissing the petition with prejudice. A certificate of probable cause will not issue, Alexander v Harris 595 F.2d 87, 90-91 (2nd Cir. 1979), and we certify pursuant to 28 U.S.C. § 1915(a) that any appeal from this order would not be taken in good faith. See Coppedge v United States, 369 U.S. 438 (1962).

SO ORDERED.

Dated: New York, New York
February 4, 1991

John S. Martin, Jr. U.S.D.J.

Appendix C



APPENDIX C

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

RAYMOND C. MANCHESTER

Petitioner

-against-

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

91 CIVIL 0732 (JSM)

JUDGMENT

Petition for a Writ of Habeas Corpus pursuant to T. 28 U.S.C. 2254, having been submitted to the Honorable JOHN S. MARTIN, U.S.D.J., and the Court thereafter on February 5, 1991, having handed down its order; summarily denying the writ, and directing the Clerk of the Court to enter judgment dismissing the petition with prejudice, it is,

ORDERED, ADJUDGED- AND DECREED;
That the Writ of habeas corpus be and it is summarily denied, and it is further

ORDERED, that the petition for a writ of habeas corpus be and it is hereby dismissed with prejudice. A certificate of probable cause will not

issue, and the Court certifies pursuant to 28 U.S.C. Section 1915(a) that any appeal from the Court's Order would not be taken in good faith.

Dated: NEW YORK, NEW YORK
March 25, 1991

Acting Clerk

Appendix D

APPENDIX D

UNITED STATES DISTRICT COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of June, one thousand nine hundred and ninety one.

RAYMOND C. MANCHESTER
Petitioner-Appellant

-v-

THE PEOPLE OF THE STATE OF NEW YORK
Respondent-Appellee

Docket No. 91-2167

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by petitioner-appellant, Raymond C. Manchester, pro se.

Upon consideration by the panel that decided the appeal, it is

ORDERED that the said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the circuit in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

Appendix E

APPENDIX E

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

RAYMOND MANCHESTER,
Defendant,

-vs-

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

**INDICTMENT NO. 1498-84
CONSOLIDATED WITH INDICTMENT NO. 7627-84
BEFORE HONORABLE DANIEL FITZGERALD, JUDGE**

**MOTION TO VACATE AND SET ASIDE JUDGEMENT
PURSUANT TO SECTION 440.20**

**MEMORANDUM OF LAW
FOR DEFENDANT**

RESPECTFULLY SUBMITTED,

**RAYMOND C. MANCHESTER, PRO SE
86-A-2011
Box 51
Comstock, New York 12821**

STATEMENT OF THE QUESTION

1. DID THE DISTRICT ATTORNEY AMEND THE INDICTMENT NO. 1498-84 BY CONSOLIDATING INDICTMENT NO. 7627-84 AND VIOLATED THE DEFENDANTS STATE AND UNITED STATES CONSTITUTIONAL RIGHTS

STATEMENT OF THE CASE

Petitioner Raymond Manchester, was arrested February 24, 1984 at 7:00 p.m. The original indictment was returned November 19, 1984. Trial commenced January 17, 1986 and the verdict was returned Jan. 31, 1986. Judgement was passed February 21, 1986. Appeal from that judgement was made December 17, 1987 and denied May 2, 1988.

There are now no other motions pending.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RAYMOND MANCHESTER,
Defendant,

-vs-

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

NO. 1498-84 CONSOLIDATED WITH IND.
NO. 7627-84

ARGUMENT

Comes now the Defendant, Raymond Manchester,
By Pro Se and moves this Honorable Court
accordingly:

Section 440.30(1)-(2)

Upon considering the merits of the motion, the
Court must grant it without conducting a hearing
and vacate the judgement or set aside the sentence,
as the case might be, if:

(A) The moving papers allege a ground
constituting legal basis for the motion See. Section
450.30., (1)(A).

This motion is based upon the Fifth Amendment of the United States Constitution:

"No person shall be held to answer for a Capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury".

Defendant's Indictment No. 1498-84 filed March 8th, 1984. Murder in the Second Degree P.L. § 125.25 (1) [Count Two] Penal Law § 125.25 (3). See attached Exhibit #1.

1). Manchester Indictment No. 1498-84 contained two pages with both counts on page two (2) and did not contain the signature of the District Attorney [Robert Morgenthau.] See Exhibit #(1).

2) Manchester Indictment No. ????-??, contained no County Clerk and Clerk of the Supreme Court, New York County., or number; or was entered on docket sheet.

3) Manchester Indictment No. ????-?? contained no signature of the Foreperson or District Attorney. See Exhibit #2 See Title 1 § 200.50., (8)(9). See L. 1970. c 996, §1 amended L. 1974, §10; 1978. c. 481. §§ 12, 36.

4) Form S.C.C.R-11-50M-73963 (82) Master Docket sheet has no entry of date of Consolidated Indictment No. 1498-84 and 7627-84.

5) Form S.C.C.R-11-50M-73963 (82) Master

Docket sheet has no entry of date of Consolidate order from the Court.

One purpose of the indictment is to prevent Court or Prosecutor from usurping Grand Jury's power by ensuring that crime for which defendant was brought to trial is in fact the one for which he was indicted by Grand Jury. See People v. Ralston, (1985), 112 A.d.2d 758, 492 N.Y.S.2d 259, Appeal denied 66 N.Y.2d 766, 497 N.Y.S.2d 1041, 488 N.E.2d 488 N.E.2d 127, Appeal denied 66 N.Y.2d 921, 498 N.Y.S.2d 1036, 498 N.E.2d 781.

Valid and sufficient indictment is required in order to prosecute Defendant for Felony. See People v. Gelfand, (1986), 131, Misc. 2d 268, 499 N.Y.S.2d 573.

Proper purpose of indictment is to bring Defendant to trial upon Prima Facie case which, if unexplained, would warrant conviction People v Brewster, (1984), 63 N.Y.2d 419, 482 N.Y.S.2d 724, 472 N.E. 2d 686. Also see the function of an indictment as described in People v Iannone, 45 N.Y. 2d 589, 412 N.Y.S.2d 110, 384 N.E.2d 656 (1978).

6) Manchester's Indictment No. ???-?? was issued by the District Attorney No. 7627-84. Which was consolidated with No. 1498-84.

7) Consolidated Indictment No. 7627-84 was it resubmitted to the Grand Jury or amended by the

District Attorney without being resubmitted to Grand Jury or even complying with Title 1, Section 200.50 (8) (9) the signature of the Foreperson or signature of the District Attorney.

Therefore this act constitutes a direct violation to Fifth Amendment of the Constitution of the United States and constitutes an amendment to Indictment No. 1498-84. See 14th Amendment (1868) "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Did the District Attorney amend the original Indictment No. 1498-84 by consolidating with Indictment No. 7627-84, and if so it is defective, the entire conviction and sentence falls. Likewise, if the indictment is dismissed, everything that has been merged with it is necessarily included in the dismissal. Where there is no valid indictment pending, it is of no avail...to say that the Court still has jurisdiction of the person and of the crime; for though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the Court has no right to proceed any further in the progress of the case for want of an indictment. EX parte Bain, 121 U.S. 1, 13 (1887) also See United States v Miller, 85 L.Ed.2d 99

(1985).

The declaration of Article V. of the amendments to the Constitution, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," is jurisdictional, and no Court of the United States has authority to try a prisoner without indictment or presentment in such case.

The indictment herefore referred to is the presentation to the proper Court, under oath, by a Grand Jury, duly impaneled of a charge describing an offense against the law for which the party charged may be punished. When this indictment is filed with the Court no charge can be made in the body of the indictment by the order of the Court, or by the prosecuting attorney, without a resubmission of the case to the Grand Jury.

And it is the imperative requirement of the provision of the Constitution above recited, which would be of little avail if an original indictment found can be changed or added to by the prosecuting office with the consent of the court, to conform to their views of the necessity of the case.

Upon an indictment so added the Court can proceed no further. There is nothing (in the language of the Constitution) which the prisoner can "be held to answer". A trial on such indictment is void. There is nothing to try or held for.

The Court did not have jurisdiction because of the material evidence (amendment of indictments No. 1498-84 and 7627-84) introduced by the people at a trial resulting in the judgement which was procured in violation of the Defendant's rights under the Constitution of this State and of the United States.

CONCLUSION

In the interest of Justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgement.

Respectfully submitted,

RAYMOND C. MANCHESTER, Pro Se
86-A-2011
Box 51
Comstock, New York 12821

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing MOTION TO VACATE AND SET ASIDE JUDGEMENT has been placed in the United States Mail postage prepaid to the following:

on this _____ day of _____, 1990.

Respectfully,

RAYMOND C. MANCHESTER, Pro Se
86-A-2011
Box 51
Comstock, New York 12821